IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

Office of the Supreme Court, U.S.
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NO. 82-498

MRS. AAGE LASSE ALVESTAD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF AAGE LASSE ALVESTAD, AND THEIR MINOR DAUGHTER
Petitioner,

VS.

MONSANTO COMPANY, MONSANTO OIL COMPANY OF THE U.K., INC., DOLPHIN INTERNATIONAL, INC., AND DOLPHIN INTERNATIONAL, S.A.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT MONSANTO COMPANY'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the decision of the United States Court of Appeals for the Fifth Circuit dismissing as untimely the appeal from the Final Judgment in this case properly follows the most recent case law from the Fifth Circuit and other Circuits construing the 1979 amendment to Rule 4(a)(5), Federal Rules of Appellate Procedure, to require that neither a tardy notice of appeal nor a motion for reconsideration under Rule 60(b), Federal Rules of Civil Procedure, may constitute a motion for extension of time to file a notice of appeal.

II.

Whether the Fifth Circuit, in dismissing as untimely Petitioner's appeal from the Final Judgment, properly articulated and applied the "unique circumstances" exception of Harris Truck

Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962), and Thompson v. Immigration and Naturalization Service, 375 U.S. 384 (1964), pursuant to which an untimely appeal will not be dismissed if the failure timely to file the notice of appeal is due to reliance on statements or actions taken by the district court which generate a reasonable belief that an appeal may be properly initiated at a later date.

III.

Whether the Fifth Circuit, in its review of the District Court's denial of Petitioner's Motion for Reconsideration under Rule 60(b), Federal Rules of Civil Procedure, properly articulated and applied the abuse of discretion standard of review in upholding the district court's denial of that Motion.

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The Respondent, Monsanto Company, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 671 F.2d 908.

STATEMENT OF THE CASE

Petitioner, a Norwegian citizen and resident, filed suit in January 1978, alleging that Mr. Aage Lasse Alvestad, also a Norwegian citizen and resident, died while working as a diver in connection with North Sea operations of the drilling vessel BORGNY DOLPHIN. Petitioner alleged that Mr. Alvestad's death was caused by the unseaworthiness of that drilling vessel and the negligence of Respondents. Petitioner sought relief under the Jones Act, 46 U.S.C. § 688, the Death on the High Seas Act, 46 U.S.C. § 761 et seq., and the general maritime law. Suit was filed within

three years of the date of the accident but over two years after that date.[1/]

On March 15, 1978, Respondent Monsanto Company, one of the initially-named Defendants, filed a Motion to Dismiss and/or Motion for Summary Judgment, as well as a brief and affidavit in support thereof.[2/] Monsanto Company subsequently filed on May 30, 1978, its answers to Interrogatories propounded by Petitioner, interposing objections to some of those Interrogatories.

After having been belatedly served in July 1978, Respondent Monsanto Oil

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[1/] As Petitioner admits in her Petition for Writ of Certiorari, the District Court properly determined that her claim under the Death on the High Seas Act was barred by the applicable two-year statute of limitations.

[2/] This is the "prematurely filed" motion for summary judgment referred to in the Petitioner's Petition for Writ of Certiorari.

Company of the U.K., Inc. filed a Motion to Dismiss on the grounds of Petitioner's failure to state a claim upon which relief can be granted, the applicability of foreign law and forum non conveniens, the expiration of the statute of limitations and improper venue. In November of that year, Petitioner filed answers to Interrogatories propounded by Monsanto Oil Company of the U.K., Inc. Subsequently in November 1979, Monsanto Oil Company of the U.K., Inc. filed another Motion to Dismiss on grounds of the expiration of the statute of limitations.

In January, 1980, Monsanto Company filed a second Motion to Dismiss on the grounds of forum non conveniens, attaching an affidavit to its Memorandum in Support of that Motion, filed in July, 1980. Respondents Dolphin International, Inc. and Dolphin International,

S.A., having been first named as Defendants in November, 1979, filed their Motions to Dismiss in January, 1980, on the basis of the expiration of the applicable statutes of limitations.

On August 6, 1980, without ever having responded to any of the Respondents' various Motions to Dismiss, some of which had, by that time, been pending for two years, Petitioner filed a Motion to Defer Ruling on Respondents' Motions to Dismiss until additional discovery could be completed. Aside from this Motion to Defer Determination, Petitioner filed no opposition to any of the several Motions to Dismiss and/or Motions for Summary Judgment filed by Respondents.

On August 20, 1980, Judge Norman W. Black, sitting in the Southern District of Texas, entered a Memorandum and Order granting Respondents' Motions to Dismiss.

The District Court held (1) the two-year statute of limitations applicable to the Death on the High Seas Act had expired prior to Petitioner's filing suit, thus barring relief under that statute; (2) any general maritime law claim was foreclosed because the Death on the High Seas Act excludes a general maritime law remedy; (3) and, in any event, foreign law, and not American law, is applicable to the Petitioner's claims and these claims should be dismissed on the basis of forum non conveniens. A Final Judgment to that effect was entered on August 20, 1980.

On September 10, 1980, more than ten days after the entry of the Court's Final Judgment, Petitioner filed a "Motion to Reconsider Order of the Court Dismissing Cause of Action and to Reinstate Cause of Action and Motion to Grant a New Trial Pursuant to Rules 59

and 60 of F.R.C.P." A hearing on that motion was held on September 18, 1980.

The District Court denied the Petitioner's Motion to Reconsider on September 22, 1980, giving the following statement of reasons:

> Plaintiff filed this action originally on January 31, 1978. On August 20, 1980, the Court dismissed the complaint based upon limitations, lack of subject matter jurisdiction, and forum non convenience [sic]. At a conference on September 18, 1980, although Plaintiff argued that [she] needed more time for discovery, [her] main argument was with Fifth Circuit precedent.
>
> Additional discovery could not aid Plaintiff in this matter. Plaintiff's argument is legal, not factual, and this Court is not in a position to change Fifth Circuit law.

Petitioner filed a second Rule 60(b) Motion for Relief in the District Court on October 16, 1980. On October 20, sixty days after the District Court's entry of its Final Judgment,

Petitioner filed a notice of appeal.[3/] On December 16, 1980, the District Court denied Petitioner's second Rule 60(b) motion for relief, noting that Petitioner had filed a "proper notice of appeal" and thus the District Court was without jurisdiction. On January 9, 1981, Petitioner filed a notice of appeal from the District Court's December 16th order denying Petitioner's

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[3/] The Petitioner makes extensive arguments in her Petition for Writ of Certiorari concerning the Fifth Circuit's failure to recognize that her notice of appeal was filed on the sixtieth day after the entry of the Final Judgment and not on the sixty-first day as indicated by the Fifth Circuit's decision. However, as is subsequently discussed in detail, the filing of the notice of appeal on the sixtieth day does not make the appeal timely in any event, and thus any "miscalculation" by the Fifth Circuit did not affect the propriety of its ultimate decision that Petitioner's appeal was untimely. The Fifth Circuit evidently recognized this fact, since it failed to grant rehearing after Petitioner, in her Petition for Rehearing before that Court, pointed out this computational error.

second Motion for Relief. The two appeals were consolidated and the Fifth Circuit rendered its decision on April 1, 1982.

In its decision, the Fifth Circuit dismissed as not timely the Petitioner's appeal from the Final Judgment, finding no unique circumstances justifying her failure to file a timely appeal. Although the Fifth Circuit determined the appeal from the District Court's denial of Petitioner's first Rule 60(b) Motion for Reconsideration to be timely, it found no abuse of discretion in the District Court's denial of that motion, and thus affirmed the District Court's decision. On May 17, 1982, the Fifth Circuit denied a Petition for Rehearing and Rehearing En Banc filed by Petitioner.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE DECISION OF THE FIFTH CIRCUIT DISMISSING AS UNTIMELY THE APPEAL FROM THE FINAL JUDGMENT PROPERLY FOLLOWS THE MOST RECENT DECISIONS FROM THE FIFTH CIRCUIT AND OTHER CIRCUITS CONSTRUING THE 1979 AMENDMENT TO RULE 4(a)(5), FEDERAL RULES OF APPELLATE PROCEDURE, TO REQUIRE THAT NEITHER A TARDY NOTICE OF APPEAL NOR A MOTION FOR RECONSIDERATION UNDER RULE 60, FEDERAL RULES OF CIVIL PROCEDURE, MAY CONSTITUTE A MOTION FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL.

The Petitioner contends that the Fifth Circuit erroneously failed to deem timely her notice of appeal from the Final Judgment since her tardy notice of appeal and/or her Rule 60(b) Motions For Reconsideration are equivalent to a motion to extend the time to file a notice of appeal. According to Petitioner, had the Fifth Circuit properly determined that her notice of appeal was filed on the sixtieth, instead of the sixty-first day, after the entry of the Final Judgment, it

would have found her appeal timely because a tardy notice of appeal, filed within sixty days of the Final Judgment, may constitute a motion for an extension of time to file a notice of appeal. Petitioner expresses her surprise that, after she pointed out this computational error to the Fifth Circuit in her Petition for Rehearing before that Court, the Fifth Circuit failed to grant rehearing to correct that error and consequently to find her appeal timely. Claiming that the Fifth Circuit's ruling finding her appeal to be untimely is contrary to Fifth Circuit precedent and cases from other Circuits liberally construing tardy notices of appeal as motions for extension of time to appeal, Petitioner urges this Court to grant a writ of certiorari to correct this error.

Petitioner's argument is wholly without merit. As the Fifth Circuit and

four other Circuit courts have recently recognized, after the 1979 amendment to Rule 4(a)(5), Federal Rules of Appellate Procedure, the appellate court is no longer empowered to treat a tardy notice of appeal or a Rule 60(b) Motion for Reconsideration as a motion for an extension of time to file an appeal. Bond v. Western Auto Supply Co., 654 F.2d 302 (5th Cir. 1981); Briggs v. Lucas, 678 F.2d 612 (5th Cir. 1982); Wyzik v. The Employee Benefit Plan of Crane Co., 663 F.2d 348 (1st Cir. 1981); Pettibone v. Cupp, 666 F.2d 333 (9th Cir. 1981); Mayfield v. United States Parole Commission, 647 F.2d 1053 (10th Cir. 1981); Brooks v. Britton, 669 F.2d 665 (11th Cir. 1982). Therefore, even had the Fifth Circuit properly determined that Petitioner's notice of appeal was filed on the sixtieth day after entry of the Final Judgment, her appeal from the Final Judgment would neverthe-

less not have been timely. Because the Fifth Circuit well understood the effect of the 1979 amendment to Rule 4(a)(5), that Court appropriately considered it unnecessary to grant Petitioner's request for rehearing in order to correct a computational error which would not have rendered timely Petitioner's appeal or altered the ultimate decision of the Fifth Circuit.

Pursuant to the Federal Rules of Appellate Procedure, an appeal is taken by filing a timely notice of appeal with the district court. Fed.R.App.P. 3. That notice must be filed within thirty days from the date of entry of the judgment or order from which the appellant appeals. Fed.R.App.P. 4. Compliance with Rule 4 is mandatory and jurisdictional. Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257, 264 (1978); Needham v. White Laboratories, Inc., 102 S.Ct. 427,

428 (Rehnquist, J. dissenting from denial of writ of certiorari). "The clear purpose of Rule 4(a) is to set a definite point in time when litigation shall be at an end, so that the prospective appellee will know that he is freed of the appellant's demands." Needham v. White Laboratories, Inc., 102 S.Ct. at 428, citing Browder v. Director of Department of Corrections of Illinois, supra. The Court of Appeals is barred from extending that time period for filing a notice of appeal. Fed.R.App.P. 26(b). Reynolds v. Hunt Oil Co., 643 F.2d 1042 (5th Cir. 1981).

There exist only a limited number of mechanisms for delaying the time period for filing a notice of appeal. The running of that period for filing a notice of appeal may be tolled by the timely filing of certain designated post-trial motions. Fed.R.App.P. 4(a)(4).

The four motions, the timely filing of which operates to toll the running of the thirty-day period to file a notice of appeal, are the following: a motion for new trial under Rule 59(a), Fed.R. Civ.P., a motion to alter or amend the judgment under Rule 59(e), Fed.R. Civ.P., a motion under Rule 52(b), Fed.R.Civ.P., to amend or make additional findings of fact, and a motion for judgment notwithstanding the verdict under Rule 50(b), Fed.R.Civ.P. See Needham v. White Laboratories, Inc., 102 S.Ct. at 428; St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co., 684 F.2d 691 (10th Cir. 1982). These motions are timely if filed within ten days of the Final Judgment.

As the Fifth Circuit recognized, Petitioner's Motion for a New Trial Under Rule 59(a) was not timely filed within ten days of the Final Judgment,

Fed.R.Civ.P. 59(b), and thus did not effect a tolling of the period for filing the appeal. Petitioner's Rule 60(b) Motions, regardless of whether timely filed, did not toll the running of the time period for filing the notice of appeal, since the filing of a Rule 60(b) Motion "never tolls the notice of appeal time." Needham v. White Laboratories, Inc., 639 F.2d 394, 397 n.4 (7th Cir.), cert. denied, 102 S.Ct. 427 (1981). See Browder v. Director, Department of Corrections of Illinois, 434 U.S. at 263 n.7. Furthermore, a Rule 60(b) motion does not itself constitute a notice of appeal. Cel-a-Pak v. California Agricultural Labor Relations Board, 680 F.2d 664 (9th Cir. 1982). Thus, Petitioner filed neither a timely notice of appeal, nor any post-judgment motions which effected a delay

in the time for filing her notice of appeal.

The only other available statutory mechanism for extending the thirty-day period for filing the notice of appeal is the filing of a motion under Rule 4(a)(5), Fed.R.App.P., for an extension of time to file the notice of appeal. Rule 4(a)(5) permits the

> district court, upon a showing of excusable neglect or good cause, [to] extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by Rule 4(a).

Rule 4(a)(5), Fed.R.App.P. (Supp. 1979) (emphasis added). Pursuant to this Rule, a motion for extension of time must be filed within the thirty-day grace period following the thirty-day period for filing the notice of appeal, or within sixty days of the entry of the Final Judgment.

It is undisputed that Petitioner filed no such motion for an extension of time. However, Petitioner argues that the Fifth Circuit should have considered her tardy notice of appeal, filed on the sixtieth day after the entry of the Final Judgment, and/or her Motions for Reconsideration as the equivalent of a motion for an extension of time to file the notice of appeal. The case law supporting this proposition, cited by Petitioner, interprets Rule 4(a), Fed.R.App.P., prior to the August 1979 amendment to that Rule. That case law has now been rejected in a series of decisions from five different Circuits in which the Courts of Appeal have unanimously interpreted the 1979 amendment to Rule 4(a) to require that an actual motion for extension of time be filed. Neither the tardy notice of appeal nor a motion for reconsideration

may substitute for the motion for an extension of time. As the Fifth Circuit stated in Bond v. Western Auto Supply Co., supra:

> We did indeed extend such clemency [i.e., treating the untimely notice of appeal as a timely motion for extension], upon a showing of excusable neglect, in those cases in which the notice itself had been filed prior to the amendment of Rule 4(a) in August 1979. Sanchez v. Board of Regents, 625 F.2d 521, 522-23 (5th Cir. 1980). See Sanchez v. Dallas Morning News, 543 F.2d 556, 557 n.2 (5th Cir. 1976) and cases cited therein. Rule 4(a) now expressly requires that an actual motion for an extension be filed with the district court.

Bond v. Western Auto Supply Co., 654 F.2d at 303 (emphasis added).

The Ninth Circuit, addressing the same issue in Pettibone v. Cupp, supra, stated:

> We are bound by the language of the 1979 amendment and its clear requirement of "a motion filed not later than 30 days after the expiration of the

> time prescribed by this Rule 4(a)." We believe this language means what it says. Indeed the Notes of the Advisory Committee on Appellate Rules state that the amendment was intended to require a formal motion, as opposed to the less formal procedure under the Rule prior to amendment.

Pettibone v. Cupp, 666 F.2d at 335 (emphasis added). As the First Circuit recognized in Wyzik v. The Employee Benefit Plan of Crane Co., supra, the August 1979 amendment to Rule 4(a) "preclude[s] such 'substantial equivalence' analysis" as that suggested by Petitioner. Wyzik v. The Employee Benefit Plan of Crane Co., 663 F.2d at 348. Accordingly, the Fifth Circuit was not empowered to treat Petitioner's tardy notice of appeal or motions for reconsideration as the equivalent of a motion for extension of time to file the appeal. Mayfield v. United States Parole Commission, supra; Briggs v.

Lucas, supra. Petitioner's notice of appeal filed on the sixtieth day after the entry of the Final Judgment could not be deemed to constitute a Rule 4(a)(5) motion for extension of time to file a notice of appeal.

Pursuant to Rule 4(a)(5), if the motion for extension of time to file the notice of appeal is timely made, the district court may grant such an extension upon a showing of excusable neglect or good cause in failing timely to file the notice of appeal. Petitioner contends that the Fifth Circuit erroneously failed to treat the District Court's statement, made in its December 16th denial of Petitioner's second Motion for Reconsideration, that Petitioner had filed a "proper notice of appeal," as an implied finding of excusable neglect or good cause with respect to Petitioner's tardy notice of appeal.

However, where the appellant "failed to properly move for an extension of time to file his notice of appeal, any implicit finding of excusable neglect by the district court is ineffectual." Brooks v. Britton, 669 F.2d at 667. Accordingly, even if the District Court's statement concerning Petitioner's filing of a "proper notice of appeal" could be construed as an implicit finding of excusable neglect, any such implicit finding is irrelevant because Petitioner failed to make a proper, timely motion for extension of time to file a notice of appeal.

It is, therefore, apparent that the Fifth Circuit's ruling finding the Petitioner's appeal from the Final Judgment to be untimely is in accord not only with Fifth Circuit precedent, but with the unanimous decisions of all of the other Circuits which have addressed

this issue. The cases cited by Petitioner with respect to her assertion of Fifth Circuit error are out-dated by the 1979 amendment to Rule 4(a) and are overruled by subsequent Circuit court decisions construing that amendment. Given the recent unanimous case law from five Circuits addressing this very issue, there is certainly no need to grant a writ of certiorari on this point which was correctly, albeit implicitly, decided by the Fifth Circuit in this case.

II.

THE FIFTH CIRCUIT, IN DISMISSING PETITIONER'S APPEAL FROM THE FINAL JUDGMENT, PROPERLY ARTICULATED AND APPLIED THE "UNIQUE CIRCUMSTANCES" EXCEPTION OF HARRIS TRUCK LINES, INC. V. CHERRY MEAT PACKERS, INC., 371 U.S. 215 (1962), AND THOMPSON V. IMMIGRATION AND NATURALIZATION SERVICE, 375 U.S. 384 (1964), PURSUANT TO WHICH AN UNTIMELY APPEAL WILL NOT BE DISMISSED IF THE FAILURE TIMELY TO FILE THE NOTICE OF APPEAL IS DUE TO RELIANCE ON ACTION TAKEN BY THE DISTRICT COURT WHICH GENERATES A REASONABLE BELIEF THAT AN APPEAL MAY PROPERLY BE INITIATED AT A LATER DATE.

The Petitioner asserts error by the Fifth Circuit in refusing to grant her relief under the "unique circumstances" rule of Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., supra, and Thompson v. Immigration and Naturalization Service, supra, pursuant to which an appellate court is permitted to assume jurisdiction of an untimely appeal when, due to "unique circumstances," it would be unfair to dismiss that appeal. Those "unique circumstances" which justify the failure timely to file an appeal must take the form of some action or conduct by the district court which is reasonably relied upon by the appellant in failing timely to file the notice of appeal. Thus, in Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., supra, the district court, after making a finding of excusable neglect, granted a timely-

filed motion for an extension of time to file the appeal. The appellate court reversed, finding no adequate showing of excusable neglect, and therefore, dismissing the appeal as untimely. Because the appellant failed to file a timely appeal in reliance on the district court's affirmative granting of the extension, these unique circumstances permitted the appellate court to entertain the late-filed appeal. See National Industries, Inc. v. Republic National Life Ins. Co., 677 F.2d 1258, 1264 (9th Cir. 1982).

In Thompson v. Immigration and Naturalization Service, supra, the unique circumstances consisted of the trial court's affirmative statement that appellant's motion for new trial was timely made, thus reasonably leading appellant to believe that motion tolled the time for filing the notice of

appeal. The district court in Needham v. White Laboratories, Inc., 639 F.2d at 398, created unique circumstances justifying the untimely appeal by orally assuring the appellant at a hearing in open court that his post-trial motion tolled the appeal time. In Chipser v. Kholmeyer & Co., 600 F.2d 1061 (5th Cir. 1979), unique circumstances existed because appellant relied in good faith on the district court's statements concerning the granting of a new trial.

In each of these cases some affirmative action taken by the district court clearly indicated that court's intention to permit an extension of time to file the appeal. As a simple reading of the Fifth Circuit's decision in this case reveals, that Court correctly articulated and applied the unique circumstances test established in these earlier cases.

Petitioner initially misstates the Fifth Circuit's holding with respect to the "unique circumstances" rule. The Fifth Circuit did not hold, as stated by Petitioner, that "unique circumstances" exist only where the appellant, in failing to file a timely appeal, relies on express statements of the district court, as opposed to action or conduct of the district court. Quite the contrary, the Fifth Circuit stated that "unique circumstances" justifying the failure timely to file the appeal are present if

> counsel for the appellant was lulled into the false sense of security that he could delay filing the notice of appeal until after the time prescribed by the applicable rules because of the extension of time granted by the [district] court. In [Harris Truck Line, Inc. v. Cherry Meat Packers, Inc., supra, and Thompson v. Immigration and Naturalization Service, supra], the appellant was misled by the words or conduct of the trial court into

> believing that the time for appeal was extended beyond that prescribed by the applicable rules.

Alvestad v. Monsanto Company, 671 F.2d at 910, quoting from Hernandez-Rivera v. Immigration & Naturalization Service, 630 F.2d 1352, 1355 (9th Cir. 1980) (emphasis added). The Fifth Circuit characterized its previous applications of the "unique circumstances" rule as situations in which "the words or actions of the district court clearly misled the aggrieved party into believing that the filing of an appeal within the thirty-day deadline was unnecessary." Alvestad v. Monsanto Company, 671 F.2d at 911 (emphasis added). But see Needham v. White Laboratories, Inc., 102 S.Ct. at 429 (in dissenting from the denial of certiorari, Justice Rehnquist states that as a prerequisite for application of the "unique circum-

stances" rule, the appellant "must rely on a statement by the District Court"). Neither in its articulation of the "unique circumstances" standard nor in its application of that test did the Fifth Circuit indicate that it required an express statement by the District Court as opposed to any conduct of that Court which may have justifiably led Petitioner to believe an appeal might properly be initiated after the statutory time for appeal had expired.

On the other hand, the Fifth Circuit did require that, in order to invoke the "unique circumstances" exception, Petitioner must show some affirmative action, conduct or statement by the District Court which clearly could have reasonably misled Petitioner, causing her to fail to file a timely appeal. As the Fifth Circuit correctly concluded, there simply was no such

affirmative action, conduct or statement by the District Court in this case on which Petitioner was entitled justifiably to rely in failing to file a timely appeal.

The Fifth Circuit noted that the mere willingness of the District Court to hear the merits of the late-filed post-trial motion is not necessarily reasonable grounds for the appellant's failure to file a timely appeal. Alvestad v. Monsanto Co., 671 F.2d at 911 n.1; Gribble v. Harris, 625 F.2d 1173 (5th Cir. 1980). The decisions relied upon by Petitioner for the proposition that the district court's willingness to hear the merits of a tardy post-trial motion is reasonably relied upon by the appellant in failing to file a timely appeal, Pierre v. Jordan, 333 F.2d 951 (9th Cir.), cert. denied, 379 U.S. 974 (1964), and Vine v.

Beneficial Finance Co., 374 F.2d 627 (2d Cir.), cert. denied, 389 U.S. 970 (1967), are distinguishable. Unlike the circumstances in those decisions, the District Court in this case in hearing the merits of the late-filed post-trial motion expressly recognized that the time for filing a motion for appeal would run on the next day after that hearing, i.e., the thirtieth day after entry of the Final Judgment. As the Fifth Circuit accurately noted, that statement by the District Court rendered unreasonable any reliance by Petitioner on the District Court's hearing of the motion on the merits as a ruling that the motion would be deemed timely to toll the time for filing the notice of appeal.

The Fifth Circuit properly held that the District Court's comments and actions in this case "clearly stopped

short of assuring the Petitioner that her post-trial motion was timely filed, thus tolling the time to file an appeal, or that the District Court was granting an extension of time to file the appeal notice." Alvestad v. Monsanto Company, 671 F.2d at 911. Indeed, the District Court's comments, as described by the Petitioner, carried just the opposite message, i.e., the time to file the notice of appeal would run on the thirtieth day because the Petitioner's post-trial motion was untimely and the District Court had granted no extension of time to file the notice of appeal.

If the unique circumstances exception is not to render meaningless Rule 4, Fed.R.App.P., requiring timely filing of the notice of appeal, that exception must be applied only where the district court's conduct was clearly misleading and appellant's reliance on

that conduct was clearly reasonable. As Justice Rehnquist recognized in his dissent from the denial of certiorari in Needham v. White Laboratories, Inc.:

> Although it is unfortunate that [the Petitioner] may have been misled by the District Court, a litigant is bound by the rules of procedure, just as he is by the rules of substantive law. A litigant is no more entitled to conclusively rely on a District Court's view of a rule of procedure than he is as to its view on matters of substantive law.

102 S.Ct. at 430.

The Petitioner was manifestly bound by the rules of procedure with respect to the requirement of timely filing of the notice of appeal. The 1979 amendments to Rule 4, Fed.R.App.P., emphasize the importance of strict adherence to the statutory time period, while providing certain mechanisms to extend that period. Petitioner in this case ignored all the available statutory mechanisms

to obtain an extension of the appeal period. She now seeks to attribute her error in failing to follow the statutory procedural rules to the District Court's actions, conduct or statements. However, no actions, conduct or statements of the District Court reasonably misled the Petitioner with respect to her failure timely to file a notice of appeal. Instead, this case involves a simple failure by the Petitioner to take the procedural steps necessary to establish the appellate court's jurisdiction. The Fifth Circuit was not obliged to take the District Court to task for the Petitioner's failure to comply with those procedural prerequisites.

III.

THE FIFTH CIRCUIT, IN ITS REVIEW OF THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION FOR RECONSIDERATION UNDER RULE 60(b), FEDERAL RULES OF CIVIL PROCEDURE, PROPERLY ARTICULATED AND APPLIED THE ABUSE OF DISCRETION STANDARD OF REVIEW IN UPHOLDING THE DISTRICT COURT'S DENIAL OF THAT MOTION FOR RECONSIDERATION.

Petitioner also asserts as error the Fifth Circuit's articulation and application of the abuse of discretion standard applicable to its review of the District Court's denial of the Petitioner's Rule 60(b) Motion for Reconsideration.[4/]

Although Petitioner assigns as error the Fifth Circuit's failure to apply the "slight abuse" of discretion standard applicable where the district court's denial of Rule 60(b) relief precludes examination of the full merits of the cause, the Fifth Circuit's opinion expressly cites the decision articulating that precise standard,

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[4/] Although the Petitioner's appeal from the Final Judgment was dismissed as untimely, the notice of appeal was timely filed with respect to the District Court's denial of Petitioner's Rule 60(b) Motion for Reconsideration. Therefore, the Fifth Circuit did review the order of the District Court of September 22, denying Petitioner's Motion for Reconsideration.

Seven Elves, Inc. v. Eskenazi, 635 F.2d 396 (5th Cir. 1981). Once again it appears that Petitioner's complaint involves not the articulation of the applicable standard but her disagreement with the Fifth Circuit's application of the standard to these facts. Asserting a number of "mistakes" or errors of law, Petitioner contends that the District Court abused its discretion by not granting relief under Rule 60(b)(1) to correct a "mistake," under Rule 60(b)(4) because the judgment is void, or under Rule 60(b)(6) for any "other reason" justifying relief. Rule 60(b), Fed.R. Civ.P.

The Fifth Circuit accurately characterized the errors cited by the Petitioner as the type normally raised and corrected by way of a timely appeal from the district court's Final Judgment. It is clear beyond cavil that

Rule 60(b) is not intended to substitute for the normal procedure of appeal. Fackelman v. Bell, 564 F.2d 734 (5th Cir. 1977). A Rule 60(b) motion can be made at "any reasonable time," and as long as a year or more after the entry of the final judgment. Because it runs contrary to the concept of finality of judgments, Fackelman v. Bell, supra, Rule 60(b) should not be expansively construed.

On review of the district court's refusal to grant Rule 60(b) relief, the issue is not the accuracy of the underlying judgment, but whether the district court abused its discretion in ruling that insufficient grounds for disturbing the finality of the judgment were not shown in a timely manner. Brennan v. Medwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971). Consequently, alleged errors of law by the district

court, such as the improper application of the forum non conveniens doctrine, are not properly susceptible of correction by a Rule 60(b) motion, but only by a timely-filed appeal. Silk v. Sandoval, 435 F.2d 1266 (1st Cir. 1971); Swam v. United States, 327 F.2d 431 (7th Cir.), cert. denied, 379 U.S. 852 (1964); Fox v. Brewer, 620 F.2d 177 (8th Cir. 1980). Although some appellate courts have permitted the district court to use Rule 60(b) relief to correct an error of law which is clear on the face of the record, such as an error involving a plain misreading of a statute, Meadows v. Cohen, 409 F.2d 750 (5th Cir. 1969), Compton v. Alton S.S. Co., 608 F.2d 96 (4th Cir. 1979), such a reopening of the judgment on the basis of an error of law is certainly not mandatory. Fackelman v. Bell, supra. The district court's refusal to reopen the judgment to

correct such errors does not constitute an abuse of its discretion. Id.

Petitioner argues that the District Court should have found the Final Judgment "void," and therefore, granted relief under Rule 60(b)(4) because the District Court failed to give notice to Petitioner before ruling on the various Motions to Dismiss and for Summary Judgment. Although the failure to give the required notice may be a serious procedural irregularity, as Professor Moore has recognized with respect to the failure to give notice before entering a default judgment,

> that error should not usually be treated as so serious as to render the judgment void. It should be considered in light of surrounding circumstances and will, at times, be harmless.

7 Moore's Federal Practice ¶ 60.25[2], at 311 (2d ed. 1982). In this instance, the failure to give that notice may well

have been harmless error. The various motions to dismiss and/or for summary judgment had been pending for several years. Nevertheless, Petitioner had failed to file any response addressing the merits of those motions. Furthermore, the facts on which turned the issues of law in this case, choice of law and forum non conveniens, were largely undisputed or were already a matter of record by way of pleadings, affidavit or answers to interrogatories. Thus, the failure to give notice in this case is hardly an error of sufficient dimension to render the judgment void.

Although the Petitioner cites as error the District Court's cutting off of discovery by its failure to compel answers to interrogatories, that error is insufficient to warrant any finding of abuse of discretion in failing to

grant Rule 60(b) relief. In fact, many interrogatories were answered by certain of the Respondents and by the Petitioner. The facts crucial to the District Court's decision on forum non conveniens and choice of law were largely already established at the time of the District Court's ruling. As the District Court noted in denying Rule 60(b) relief, additional discovery would not have enabled Petitioner to prevail on these questions of law in any event.

Petitioner erroneously cites as error the District Court's failure to require affidavits in support of the Respondents' summary judgment motions. At least one such affidavit was filed.[5/]

[5/] An affidavit was attached to the Memorandum filed in July, 1980 in support of Respondent Monsanto Company's January, 1980 Motion to Dismiss. That affidavit had also been attached to the previously filed "premature" Motion for Summary Judgment filed by the same Respondent in March, 1978.

In any event, summary judgment may properly be granted based alternatively on the pleadings and the answers to interrogatories filed in this case. Although a variety of methods of proof may be used on a motion for summary judgment, including affidavits, "[n]o one method of proof is required; and one or more [methods] in varying combinations may be used." 6 Moore's Federal Practice ¶ 56.23, at 56-1388 (2d ed. 1978). The cases cited by Petitioner simply do not require the filing of affidavits as the sole method of proof in support of the motion for summary judgment. Indeed, the plain language of Federal Rule of Civil Procedure 56(b) states that a defending party may "move with or without supporting affidavits for a summary judgment . . . ." Rule 56(b), Fed.R.Civ.P. (emphasis added).

It is, therefore, clear that the mistakes alleged by Petitioner are not of a nature which would entitle her to relief despite her failure timely to file an appeal. The Fifth Circuit properly found no abuse of discretion in the District Court's refusal to grant Petitioner relief from the Final Judgment without a proper appeal.

CONCLUSION

Although the Petition contains elaborate exhortations concerning due process violations and alleged denial to Petitioner of her day in court, an analysis of the issues presented by the Petition for Writ of Certiorari plainly illustrates that no such violations occurred in this case. Rather, this case involves a failure by Petitioner to abide by the procedural requirements for a proper appeal and, having committed

that procedural error, her attempts to escape the consequences of that error.

As the Statement of Questions Presented and Reasons Why the Writ Should Be Denied make clear, with respect to each issue which Petitioner has presented to this Court for it possible review, the Fifth Circuit's decision correctly applied the appropriate legal standard to the facts of this case, fully considering and correctly deciding that issue. The Fifth Circuit's decision in this case is contrary to no decision of this Court. It is not at variance with any authority from other Circuits. The cases cited by Petitioner are, in some instances distinguishable, and in other instances, have simply been overruled by subsequent case law. Each of Petitioner's contentions concerning alleged errors by the Fifth Circuit is wholly lacking in

merit. Furthermore, the contentions and issues put forward by Petitioner are most certainly not of sufficient significance to merit review by this Court.

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of Respondent Monsanto Company's Brief in Opposition to the Petition for Writ of Certiorari have been duly and properly delivered to Petitioner's counsel, Mr. Benton Musslewhite, Law Offices of Benton Musslewhite, Inc., 609 Fannin, Suite 517, Houston, Texas 77002, by hand-delivering same and/or by U.S. certified mail, return receipt requested, this the 15 day of October, 1982.

Original Signed by
Eugene J. Silva

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